No. 283.

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In the Supreme Court of the United States.

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JOHN B. WIGHT, JOHN W. ROSS AND LANSING H. BEACH, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, APPELLANTS,

vs.

CHARLES H. DAVIDSON, A. A. WILSON AND JOHN B. LARNER, TRUSTEES.

BRIEF FOR APPELLANTS.

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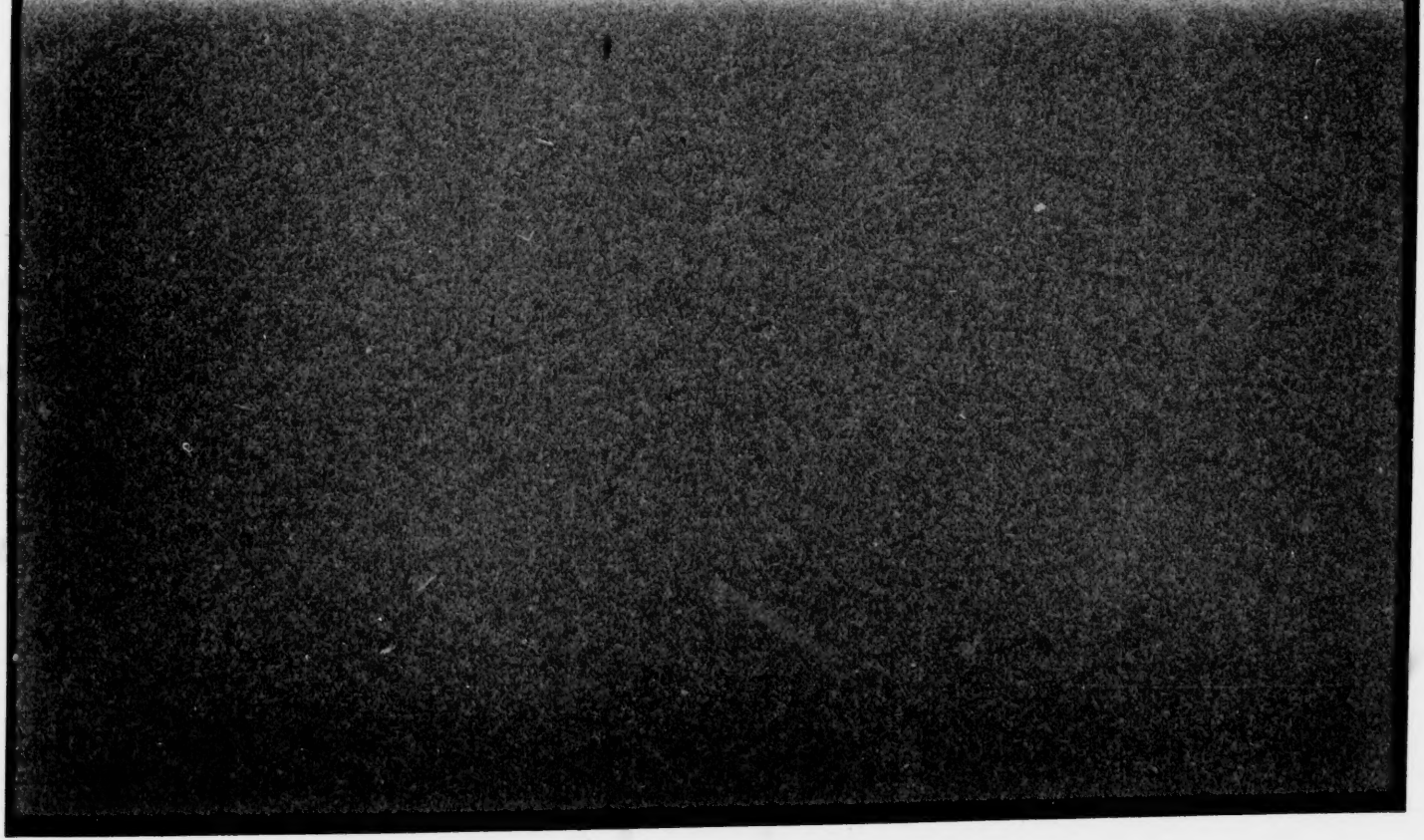

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STATEMENT OF FACTS.

On March 2, 1893, by an act entitled "An act to provide a permanent system of highways in that part of the District of Columbia lying outside of the city" (27 Stat. at L. 532, Chap. 197), provision was made for the extension of highways to the boundary line of the District. This plan involved the condemnation of land embraced within the lines of the streets as laid out upon plans made pursuant to said act. After proceedings were begun under this act, it was found that the revenues of the District and the needs of the people did not justify carrying out immediately so extensive and expensive a plan. Accordingly, so much of said act of Congress as required the condemnation of lands necessary for the purposes of the highways thus laid out was repealed by the act of Congress approved June 28, 1898. Certain sections of the original act, which required the preparation of plans, recording thereof, etc., were continued in force, and, pursuant thereto, plans of proposed

extension of streets to the District line have been prepared from time to time, and duly approved and recorded.

The plan of gradually extending the streets, as the necessities of the situation required, was then adopted, and in pursuance thereof, Congress passed three acts during the closing days of the last session of the Fifty-third Congress, providing for opening, extending and widening of thirteen different streets (act approved February 25, 1899, being "An act for the widening of Nineteenth street northwest;" act approved March 3, 1899, entitled "An act to extend S street in the District of Columbia, and for other purposes;" and an act approved March 3, 1899, entitled "An act for the extension of Pennsylvania avenue southeast, and for other purposes").

The last two of the foregoing acts provided for the extension, widening or opening of twelve different streets, and are apparently hurried consolidations of various bills then pending.

By the provisions of section 1 of the act of Congress approved March 3, 1899 entitled "An act to extend S street in the District of Columbia, and for other purposes," above mentioned, the appellants, Commissioners of the District of Columbia, were authorized and directed to institute by petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, Twenty-second, and Decatur streets through lots 41 and 42 of Phelps and Tuttle's subdivision of Connecticut Avenue Heights within thirty days after the passage of the act, provided the owners of the "Kall" tract would dedicate the land in said tract contained within the lines of said streets.

The owners of the "Kall" tract having dedicated to the District of Columbia for highway purposes the land in said tract contained within the lines of said streets as proposed to be extended, and within thirty days after the passage of the act, the Commissioners instituted the proceedings now

before this court for review. On April 3, 1899, the Supreme Court of the District of Columbia, passed its order (page 2 of the Record) directing all persons interested in the proceeding to appear on or before a day fixed and show cause, if any, why the prayer of the petition for a jury to assess the damages to the owner of the land to be taken and to assess not less than one-half thereof as benefits, as in the act of Congress provided, should not be granted. By the terms of the order the notice was published in the Washington Post and Washington Times, newspapers of general circulation in the District of Columbia, and in The Washington Law Reporter, and due proof of such publications was filed in the case. No objection having been made, on July 21, 1899, the court passed its order (Rec., p. 3) directing the marshal to summon a jury to proceed with the condemnation of the land and to make the assessments. The jury was duly summoned and sworn, and, after viewing the premises, began the taking of testimony on August 29, 1899, and continued to do so from day to day until the hearing was closed. The return of the marshal shows that arguments were heard on behalf of the petitioners and on behalf of the owners of the "Kall" tract, the appellees in this proceeding. Among the witnesses examined were W. Riley Deeble and John C. Davidson, equitable owners of undivided interests in the "Kall" tract. The jury awarded as damages the sum of $52,000, and, as required by the act of Congress under which the proceedings were had, assessed one-half of said amount, as benefits, against the pieces and parcels of land situate and lying on each side of the extension of said street, and also on adjacent pieces or parcels of land which they found would be benefited by the extension of said streets, including, among others, the land of the appellees.

On September 19, 1899, the court passed its order *nisi* (Rec., p. 10), confirming the verdict, award and assessment of the jury unless cause to the contrary should be shown on

or before October 4, 1899. By the terms of the order it was required to be published in The Washington Law Reporter and in the Evening Star, a newspaper of general circulation in the District of Columbia, and due proof of such publication was filed in the cause. On the 4th day of October, 1899, the appellees filed exceptions to the award (Rec., p. 12). On October 9, 1899, the Commissioners of the District of Columbia moved the court to finally confirm the verdict, award and assessment of the jury notwithstanding the exceptions filed; thereupon the appellees moved the court for leave to traverse the return of the marshal, in so far as it recited that W. Riley Deeble appeared in said proceedings on behalf of the owners of the "Kall" tract, and filed affidavits in support (Rec., pp. 16, 17).

This motion was not called to the attention of the court, and no action was had thereon. As hereafter shown, the Court of Appeals of the District of Columbia proceeded on the theory that the averments of the affidavits filed in support of said motion were true, and that the return of the marshal was incorrect. The exceptions of the appellees to the award and assessment, and the motion of the Commissioners, appellants herein, for its confirmation came on to be heard together before the justice of the Supreme Court of the District of Columbia, holding a District Court, and on November 18, 1899, that court overruled the exceptions of the appellees and confirmed the verdict, award and assessment of the jury. From that order the present appellees prosecuted an appeal to the Court of Appeals of the District of Columbia. That court on April 25, 1900, reversed the order or decree of confirmation of the award and findings of the jury, and remanded the case to the Supreme Court of the District of Columbia with directions to vacate such order or decree and findings of the jury as to the present appellees, on two grounds:

First. Because the provisions of the act of Congress in question requiring the assessment of one-half of the cost of

the improvement, as benefits, against adjacent property, was unconstitutional and void for the reason, as stated in the opinion—

> "The legislative authority can not arbitrarily prescribe a minimum limit below which the assessment may not fall, as that in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefit is not a legislative but a judicial question upon which the parties in interest are entitled to be heard and to have their day in court."

And, secondly, because the act of Congress in question failed to provide due process of law in that it contained no provision for the personal service of notice upon persons whose lands were found to be benefited. From this decree of the Court of Appeals, this appeal has been prosecuted.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred—

1. In holding that the provisions of section 1 of the act of Congress approved February 25, 1899, in relation to the assessment of benefits are unconstitutional and void.

2. In holding that it is beyond the power of Congress to prescribe a minimum limit below which the assessment of benefits for a public improvement may not fall.

3. In holding that the determination of the amount of actual benefit resulting from a public improvement is not a legislative but a judicial act.

4. In holding that the act of Congress in question is unconstitutional and void because it fails to prescribe due process of law for the persons whose lands are to be assessed for benefits.

5. In finding and holding that as to the appellees in this case, there was not due process of law.

ARGUMENT.

Section 1 of the act of Congress "to extend S street in the District of Columbia and for other purposes," approved March 3, 1899, 30 Stat. 1344, provides as follows:

> "That within thirty days from the passage of this act the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the Supreme Court of the District of Columbia, sitting as a District Court, a proceeding to condemn the land necessary to open and extend S, 22d and Decatur streets through lots forty-one and forty-two of Phelps and Tuttle's subdivision of Connecticut Avenue Heights, part of Widow's Mite: Provided, That the owners of the "Kall" tract dedicate the land in said tract contained within the lines of said streets: And provided further, That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets, and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 5 provides:

> "That the proceedings for the condemnation of said land . . . shall be under and according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, which provide for the condemnation of land in said District for public highways."

Section 7 provides:

> "That the sums to be assessed against each lot or piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular

piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets."

The Court of Appeals of the District of Columbia, resting its conclusion upon the decision of this court in Norwood *vs.* Baker, 172 U. S. 269, held this provision to be unconstitutional, and in connection therewith used the following language:

> "It [referring to Norwood *vs.* Baker] was an extreme case; but it awakened the courts to a vigorous assertion of the true principle which should govern in all cases of special assessments made for public improvements. And that principle is, as stated in the case of Norwood *vs.* Baker, that the value of the special benefit to the adjacent property from the public improvement, and not the cost of the improvement or any part of such cost as such, is the limitation of assessment upon the property. Necessarily, the cost of the improvement is in itself a limitation beyond which the public authorities can not go in any case; and a proper limit within such limitation beyond which the assessment should not go may well be prescribed by the legislative authority. But it is a logical and necessary consequence from the rule prescribed that the legislative authority may not arbitrarily prescribe a minimum limit below which the assessment may not fall; for the reason that this in itself would be an assessment irrespective of the actual amount of benefit, and the determination of the amount of actual benefits is not a legislative, but a judicial question, upon which the parties in interest are entitled to be heard and to have their day in court. It is true that in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made only on property benefited by the improvement, and provides that the assessment shall be made in a judicial proceeding. But it does not leave the question of special benefits to be determined in such proceeding.

> It arbitrarily finds for itself that the whole adjacent property subject to assessment, or intended to be assessed, will have been specially benefited to the extent of one-half of the cost of the improvement; and all that is left to the jury in the judicial proceeding is not to find the value of the special benefit to each adjacent piece of property, but to apportion at least one-half of the cost, and as much more as they may think proper, between the adjacent lots. This, we think, is in direct contravention of the principle enunciated in the case of Norwood *vs.* Baker, and can not be supported as a valid exercise of legislative authority."

It is obvious that this judgment of the Court of Appeals of the District of Columbia, now presented for review, involves for determination a question of the utmost importance, not only in the District of Columbia, but throughout the United States, and it will become necessary for this court to determine how far its previous decisions have been affected by the judgment of the court in Norwood *vs.* Baker, for it is apparent that the Court of Appeals of the District of Columbia and a number of other courts throughout the United States are of opinion that Norwood *vs.* Baker is a reversal of former cases.

The Act of Congress for the Extension of S Street is Constitutional.

In determining the constitutionality of the act of Congress under consideration, it is proper to consider in their order the elements necessary to its validity, and, incidentally, the correctness of the views of the Court of Appeals of the District of Columbia thereon.

We submit that the following propositions are established by the decisions of this court and of other courts, viz.:

1. That Congress may determine what proportion of the cost of a public improvement shall be assessed against the property specially benefited thereby.

2. That Congress itself may fix the taxing area or commit the duty to a tribunal created by it.

3. That Congress itself may prescribe the rule of apportionment of special benefits or commit the duty to a tribunal created by it, and that *if the rule so prescribed is actual benefits received,* the law is constitutional.

CONGRESS MAY DETERMINE WHAT PROPORTION OF THE COST OF A PUBLIC IMPROVEMENT SHALL BE ASSESSED AGAINST THE PROPERTY SPECIALLY BENEFITED THEREBY.

Section 5 of the act of Congress, the validity of which is now involved, provides:

> "That the proceedings for the condemnation of said land . . . shall be under and according to the provisions of chapter eleven of the Revised Statutes of the United States relating to the District of Columbia which provide for the condemnation of land in said District for public highways."

The provisions of chapter XI of the Revised Statutes referred to in said section relate exclusively to the condemnation of land and contain no provisions whatever for the assessment of benefits. So far as the taking of land pursuant to the provisions of the act under consideration is concerned, no question is raised. The property has been taken and paid for.

The first section of the act, heretofore quoted, provides:

> "That of the amount found due and awarded as damages for and in respect of the land condemned under this section for the opening of said streets, not less than one-half thereof shall be assessed by the jury in said proceedings against the pieces and parcels of ground situate and lying on each side of the extension of said streets and also on all or any adjacent pieces or parcels of land which will be benefited by the opening of said streets as herein provided."

Section 7 provides as follows:

> "That the sums to be assessed against each lot or piece or parcel of ground shall be determined and designated by the jury, and in determining what amount shall be assessed against any particular piece or parcel of ground, the jury shall take into consideration the situation of said lots and the benefits that they may severally receive from the opening of said streets."

This act of Congress specifically requires that "not less than one-half" of the cost of the extension of the street—

> "shall be assessed by the jury in said proceedings against the pieces or parcels of ground situate and lying on each side of the extension, and *also* on all or any adjacent pieces or parcels of land *which will be benefited* by the opening of said street."

The Court of Appeals on the other hand says:

> "That the legislative authority *may not* arbitrarily prescribe a minimum limit below which the assessment may not fall . . . and the determination of the amount of actual benefit *is not* a legislative but a judicial question."

The issue therefore is very decided and clear.

In considering the validity of this provision it is important to bear in mind what this court has repeatedly said in reference to the relation between the Congress of the United States and the District of Columbia.

> "The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
>
> Parsons *vs.* Dist. of Col., 170 U. S. 45.

It will also be borne in mind, what this court has stated on several occasions, that the provision relating to the assessment of benefits is the exercise of the power of taxation and is quite different from the exercise of the right of eminent domain.

As held by this court in Bauman *vs.* Ross, 167 U. S. 588, in considering the provisions of the Highway Extension Act relating to the assessment of benefits:

> "The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court."

This court has on more than one occasion sustained the validity of laws of the same nature and possessing identically the same elements as the case now under consideration, and has specifically sustained the right of Congress to determine what proportion of the cost of a public improvement shall be assessed against property specially benefited, and we submit those cases must control this case, *unless* the decision of this court in Norwood *vs.* Baker is a reversal of such former decisions, which we deny. That feature will be hereafter considered.

In Spencer *vs.* Merchant, 125 U. S. 345, this court had under consideration an act of the legislature of New York, passed in 1881, directing the assessment of the *entire cost* of the opening of a street remaining unpaid, together with a proportional part of the expenses of making the assessment, with interest, to be levied upon certain *specified property.* There were contentions similar to those made here, in opposition to the validity of the act. The Court of Appeals of the State of New York sustained the act, and its decision was affirmed by this court. This court, quoting with approval from the decision of the Court of Appeals of New York, said:

> "The act of 1881 determines *absolutely* and *conclusively* the *amount of tax* to be raised and the *property to be assessed*, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review."
>
> . . . . . .
>
> "The legislature in the exercise of its power of taxation has the right to direct the *whole* or a *part* of the expense of a public improvement, such as the laying out, grading or repair of a street, to be assessed upon the owners of lands benefited thereby and the determination of the *territorial district* which should be taxed, for a local improvement is within the province of legislative discretion."

In Parsons *vs.* District of Columbia, 170 U. S. 45, this court sustained the validity of an act of Congress which required an amount in excess of the total actual cost of a public improvement to be assessed against abutting property at the rate of $1.25 per linear front foot of abutting property.

The Court of Appeals of the District of Columbia itself, in the majority opinion of the court, sustained the validity of the provision of the Highway Extension Act, requiring the assessment of one-half of the cost of extending a street against adjacent property, and that much of the opinion, at least, was affirmed by this court in the same case, with others on review.

Bauman *vs.* Ross, 167 U. S. 584.

The Court of Appeals said:

> "In so far as the general principle of the assessment established by section 15 of this act is concerned, there can be *no substantial objection.* It *is fair, liberal and regular. One-half only of the cost,* and that payable in five annual instalments, is to be assessed against the property found to be benefited by the improvement in proportion to the benefits by each tract received. The benefits are not apportioned by an arbitrary rule of frontage, area or neighborhood; but are to be ascertained by a jury under the direction and supervision of a competent court, with the same right to appeal as in other cases."
>
> District of Columbia *vs.* Armes, 8 App. D. C. 412.

Yet that court now says in the case at bar—

> "that the legislative authority *may not* arbitrarily prescribe a minimum limit below which the assessment may not fall."

In Hagar *vs.* Reclamation District, 111 U. S. 702, this court said:

> "Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure."

In Cooley on Taxation, page 447, the following conclusions from many authorities are cited:

> "1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "3. *The whole cost in other cases is levied on lands in the immediate vicinity of the work.*"

> "*In a constitutional point of view either of these methods is admissible*, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is *legislative*, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible, arbitrary rule."

The whole subject of street extensions and the validity of the provisions of laws relating to the assessment of benefits in the District of Columbia ought to be considered as finally settled for this jurisdiction since the decision of this court in Bauman *vs.* Ross, 167 U. S. 584, in which the history of the legislation upon the subject of assessments for benefits and of judicial decision thereon was carefully reviewed. It would serve no useful purpose to quote at length from that decision. As bearing, however, upon the particular question under consideration, we desire to quote briefly.

As above shown, the Court of Appeals expressly held—

> "that the legislative authority can not arbitrarily prescribe a minimum limit below which the assessment may not fall"—

and that "the determination of the amount of actual benefits *is not* a *legislative* but a judicial question." Not only is such holding contrary to authorities generally, but is in direct conflict with the conclusions of this court on the appeal from the Court of Appeals of the District of Columbia. This court in Bauman *vs.* Ross, referred to, page 589, said:

> "But it is for the legislature, and not for the judiciary to determine whether the expense of a public improvement should be borne by the whole State, or by the district or neighborhood immediately benefited.

"The provisions of this section are to be referred, not to the right of eminent domain, but to the right of taxation; and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court. . . .

"The legislature, in the exercise of the right of taxation, *has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or repair of a street, to be assessed upon the owners of lands benefited thereby.* Davidson *vs.* New Orleans, 96 U. S. 97; Hagar *vs.* Reclamation District No. 108, 111 U. S. 701; Spencer *vs.* Merchant, 125 U. S. 345; Walston *vs.* Nevin, 128 U. S. 578, 582; Illinois C. RR. Co. *vs.* Decatur, 147 U. S. 190, 198, 199; Paulsen *vs.* Portland, 149 U. S. 30. This authority has been *repeatedly exercised* in the District of Columbia by Congress, with the sanction of this court. Willard *vs.* Presbury, 81 U. S. 676; Mattingly *vs.* Dist. of Col., 97 U. S. 687; Shoemaker *vs.* United States, 147 U. S. 282. . . . ."

The apparent justification for the decision of the Court of Appeals, in direct conflict with the decision of this court in Bauman *vs.* Ross, is the later decision in Norwood *vs.* Baker; but the Court of Appeals, from the beginning to the end of its decision cites no authorities whatever, aside from Norwood *vs.* Baker, (except Allman *vs.* District of Columbia, on the subject of notice), and makes no mention of the decision in Bauman *vs.* Ross, as if the two were irreconcilably in conflict. And this, we respectfully argue, is not true.

We therefore respectfully submit that Congress had the power to determine what part of the cost of extending S street should be assessed against property specially benefited thereby.

Congress May Itself Determine the Taxing Area or Commit the Duty to a Tribunal Created by it.

Upon the question as to the right of Congress to either determine itself the taxing area or to commit it to a tribunal created by it, we think there can be no doubt.

In Dillon's Municipal Corporations, Vol. 2, Sec. 752, (4th edition), the conclusions reached are thus expressed:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

In Cooley on Taxation, page 447, the author says:

> "The whole cost in other cases is levied on lands in the immediate vicinity of the work.
>
> "In a constitutional point of view either of these methods is admissible, and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible arbitrary rule."

In Bauman *vs.* Ross, *supra*, where the act of Congress contained a provision for the assessment of benefits without specifically limiting the taxing area, it was argued that the act was unconstitutional for that reason. In this case it was argued below that the act of Congress involved in the case at bar is invalid because it *does* limit the taxing area to a certain extent. In answer to the argument this court said (p. 288):

> "It was argued that section 15 was too uncertain to be put in execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular subdivision in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular subdivision or the whole District of Columbia. And there does not appear to be any insufficiency as to which alternative was in the contemplation of Congress. The lands to be assessed being described generally as 'the lands benefited' by the condemnation and establishment of the new highway or by the abandonment of an existing highway, and again as the 'property thereby benefited,' and as the lands which the jury 'find to be benefited,' without any words of restriction to lands in the particular subdivision, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment. The question, what parcels of lands within the district so ascertained are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal intrusted with the authority of making this assessment."

In the same case this court said (p. 288):

> "The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. Spencer *vs.* Merchant, and Shoemaker *vs.* U. S., above cited; Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, 167, 168, 175;

> Ulman *vs.* Baltimore, 165 U. S. 719. See, also, the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in Payne *vs.* Brooklyn, 4 N. Y. 419, 430."

We therefore submit, in view of the foregoing authorities, that the provision of the act of Congress under consideration, whereby the taxing area was in part defined by Congress, and in part committed to the jury, is valid.

Congress itself may Prescribe the rule of Apportionment in the Taxing District or leave it to a Tribunal Created by it, and if the Basis of Apportionment is Actual Benefits Received, the Act is Valid.

It is apparent, we submit, in view of the foregoing authorities, that no well founded objection can exist to the act of Congress under consideration because it fixed what part of the cost of extending S street should, at least, be assessed as special benefits. If that be true, it is very clear that the question at the very bottom of the matter is whether the act of Congress arbitrarily required the apportionment of one-half the cost of the improvement on adjacent land *irrespective of actual benefit*; and if it did not, and the rule of apportionment, fairly ascertainable from the act itself, *is actual benefit*, then the law is unquestionably valid.

Congress may itself determine the rule of apportionment or commit it to a jury.

> "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by Commissioners. Mattingly *vs.* Dist. of Col., Spencer *vs.* Merchant, Walson *vs.* Nevin, Shoemaker *vs.* U. S., Paulsen *vs.* Portland, and Fallbrook Irrig. Dist. *vs.* Bradley, above cited."
>
> Bauman *vs.* Ross, p. 288.

What, then, is the rule of apportionment prescribed by the act of Congress?

The Court of Appeals in its opinion (Rec., p. 23), said:

> "It is true, that, in the enactment in question, the legislative authority recognizes the principle that the assessment is to be made *only* on *property benefited* by the improvement and provides that the assessment shall be made in a judicial proceeding."

What was the occasion for a recognition of the principle in this act of Congress unless it was to control? We read the entire law to ascertain the intention of Congress, and if an intention appears which accords with constitutional rights, why should not that intention control? It is a cardinal rule of construction that if an act of Congress is susceptible of two constructions, one which supports and the other defeats its constitutionality, that which supports the validity of the act will be adopted.

We earnestly contend, however, that the several sections of the act relating to the assessment of benefits, not doubtfully, but clearly required the asssessment in this case to be according to actual benefits.

This is apparent from several provisions of the act. Section 1 provides for the assessment against the pieces and parcels of land which will be benefited by the opening of the streets. Section 7 provides that in determining WHAT amount (thus leaving open the amount) should be assessed against *any* particular piece or parcel of ground the jury should take into consideration the situation of the lots "and the *benefits* that they may severally *receive* from the opening of the streets." The sections of the act quoted clearly indicate that it should be left to the jury to determine not whether land on each side of the street was in fact benefited, but the extent of such benefits. If it was otherwise, the act itself would have fixed the amount of the assessment to be borne by each parcel of land, and would

not have required the jury to take into consideration the situation of the land and the *benefits* that it would receive from the opening of the street.

In the respects mentioned the provision of this law is in no essential particular different from the provisions in the Highway Extension Act, considered and approved by this court in Bauman *vs.* Ross. Considering this particular provision, the court in that case said:

> "Nor can we entertain any serious doubt as to the *rule of assessment* which is to govern. The directions that the jury shall ascertain and determine what property is benefited by the establishment of the highway, and 'shall assess against each parcel which it shall find to be so benefited its proper proportional part of' the whole sum directed to be assessed, making due allowance, when part only of a tract has been taken, for any deduction already made, in the assessment of damages for such taking, 'on account of the benefit to the remainder of the tract,' reasonably, if not necessarily imply that the assessment is to be proportional to the benefit, and not to the market value or any other test; and are equivalent to the words in the Rock Creek Park Act, directing lands in the District of Columbia to be assessed, 'as nearly as may be, in proportion to the benefits resulting to such real estate.' Act of September 27, 1890 (26 Stat. at Large 493, Chap. 1001, Sec. 6); Shoemaker *vs.* United States, 147 U. S. 282, 286, 302."

It is apparent, therefore, from the foregoing authorities, that the provisions of this law, which fixed the proportion of the expense of opening this street, to be assessed as benefits against adjacent property are constitutional and valid, unless this court, in Norwood *vs.* Baker has changed or reversed this rule of law. It therefore becomes important to consider and review the case of Norwood *vs.* Baker.

The Case of Norwood vs. Baker.

Whether justified or not, the recent decision of this court in Norwood *vs.* Baker, 172 U. S. 269, has produced consternation among many municipalities throughout the United States, and in a number of States has caused a departure from former rulings. Its effect, as understood by the Court of Appeals of the District of Columbia (as erroneously understood, we contend), is apparent in this case.

The court, in its opinion, said (Rec., p. 22):

> "With respect to the first of these questions [the constitutionality of the act], we think that it has been conclusively determined for us by the decision of the Supreme Court of the United States in the case of Norwood *vs.* Baker, 172 U. S. 269. As we understand the decision, *which undoubtedly has the effect of greatly qualifying the previous expressions of the same high tribunal upon the matter of special assessments,*" etc.

The suit referred to was brought by the plaintiff Baker in the Circuit Court of the United States for the Southern District of Ohio to enjoin the enforcement of a special assessment, on the ground that it violated the Fourteenth Amendment to the Constitution of the United States. The Supreme Court on this point said (p. 277):

> "The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio."

The following proposition was laid down by the court (p. 279):

> "In our judgment, the exaction from the owner of private property of the cost of a public improve-

> ment in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

The Supreme Court expressly placed its decision upon the ground that the assessment violated the Fourteenth Amendment to the Constitution of the United States, saying (p. 296):

> "We have considered the question presented for our determination with reference only to the provisions of the national Constitution."

The court, however, added (p. 296):

> "But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the Constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits."

At the conclusion of its opinion the court announced its decision in the following words (p. 297):

> "The judgment of the Circuit Court must be affirmed upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered."

The statutes of Ohio under consideration provided that the assessment of benefits should be made by the council on the abutting and adjacent property, or other property benefited, *either* in proportion to the benefits which may result from the improvement, *or* according to the value of the property assessed, *or* by the front foot of the property bounding and abutting upon the improvement as the council might determine. The ordinance of the village of Norwood, providing for the opening of the street through the land of Baker, provided that the expense of the condemnation should be assessed "*per front foot* upon the property bounding and abutting on the street opened." Neither the ordinance passed before the verdict of the jury condemning the land nor the ordinance passed after the finding of the jury and levying the assessment, made any provision whatever in reference to benefits. They undertook to require the assessment of the total cost of the public improvement, with the expenses of the proceeding to be assessed on the land of Baker wholly *irrespective of the benefits received.*

The portion of the opinion to which we invite special attention is that portion wherein this court said:

> "The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. . . . The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, *without any reference to special benefits.*"

This court has by that case therefore held that it is contrary to the Fourteenth Amendment to the Constitution for a State, or a municipality in a State, to assess the cost of laying out a public street, *by the front foot*, upon the land abutting such street by a *rule* of apportionment which *disregards the actual benefits* received. That is the sum and

substance of the decision as we understand it. If that be true, it is *not* in conflict with the decision in Bauman *vs.* Ross, where this court found the benefit rule of apportionment to exist, and, as the rule of apportionment in this case is special benefits received, as we have shown, Norwood *vs.* Baker does not control, but the decision of this court in Bauman *vs.* Ross. We confidently submit that if the town of Norwood had adopted the rule of apportionment or assessment authorized by the statutes of Ohio, to wit, "in proportion to the benefits which may result from the improvement," instead of the alternative rule authorized by the same act, to wit, "per front foot upon the property bounding and abutting on the street opened," as it did, the act would not have been obnoxious to constitutional objections even if the total cost had been assessed against the property of Mrs. Baker, as was done.

This court did not intend and did not, in fact, reverse or depart from the rule laid down in Bauman *vs.* Ross. In the former case, the cost of the improvement was assessed, irrespective of benefits, in the latter, according to benefits. In the former, this court said it was a—

> "case . . . under a *rule* or *system* which violated the Constitution, in that the entire cost . . . was imposed . . . *without any reference to benefits.*"

In the latter case this court said:

> "Nor can we entertain any serious doubt as to the *rule of assessment*; . . . that the assessment is to *be proportional to the benefit.*"

Any other view of the case of Norwood *vs.* Baker would, indeed, justify the claim that it is contrary to principle and precedent. Indeed, even considering it as deciding what we have stated, many reviewers insist that, in so far as this court holds the Fourteenth Amendment implies restrictions upon State legislative bodies as respects assessments, it is contrary to principle and precedent.

See Harvard Law Review, May and June, 1900:

"The Fourteenth Amendment and Special Assessments, by Harry Hubbard, of Dillon & Hubbard, New York."

Davidson *vs.* New Orleans, 96 U. S. 97, 106.
Spencer *vs.* Merchant, 125 U. S. 345, 356.
Walston *vs.* Nevin, 128 U. S. 578, 582.
Falbrook Irrigating Dist. *vs.* Bradley, 164 U. S 112, 170.

In concluding this branch of the case, therefore, we insist that there is no conflict between Norwood *vs.* Baker and Bauman *vs.* Ross, and that in this jurisdiction, and as to this case, the latter controls.

There was Due Process of Law in this Case.

As stated at the outset the second ground asserted by the Court of Appeals, for declaring the act of Congress in question unconstitutional, was that it failed to provide due process of law in that it failed to contain provision for notice to the owners of land to be assessed for benefits.

In considering this feature of the decision of the Court of Appeals, we shall, for convenience, subdivide the subject of notice in the following manner, and shall contend:

1. That the act of Congress itself provided sufficient notice of the proposed assessment.

2. That even if that is not so, it is not necessary that the act of Congress itself should provide for notice.

3. That even if the foregoing contentions are unsound the notice by publication given at the beginning of the proceedings was sufficient and personal service of process was not necessary.

4. That if personal notice of process was necessary, the personal service of process upon appellees actually given in this case was in ample season to constitute "due process of law."

The Act of Congress Itself Provides Sufficient Notice of the Proposed Assessment.

While the act makes no express provision for notice to the owners of land whose land is to be assessed, it nevertheless by necessary implication provides for such notice. An important consideration, to which we invite the attention of the court, is that this is not an act authorizing the opening of the streets, leaving the *time when the proceeding should be begun* to the discretion of the Commissioners; but the *act itself* fixed a time limit within which the proceeding should be instituted. The appellees are chargeable with notice of this act of Congress, and that the act itself required the institution of proceedings within thirty days. They are further chargeable with knowledge of the fact that the act expressly required the assessment of benefits against their property. They do not come in the category of the owners of "any adjacent pieces or parcels of land which will be benefited by the opening of said street," but in the category of the owners of "pieces and parcels of ground situate and lying on each side of the extension of said streets." It is identically the same, therefore, as if Congress had inserted in the act of Congress itself the names of the appellees and the name of the tract of land owned by them. Further, the operation of the act depended upon the voluntary act of the appellees themselves. The Commissioners had no right to file the petition until, after the passage of the act, the *appellees* made the dedication required by the second proviso to the first section of the act. The appellees themselves, therefore, by their own conduct, acting pursuant to the provisions of the act of Congress itself, made it operative. There is enough, therefore, in this case, considering that the constitutionality of the act of Congress is involved, to justify the court in holding that the act itself, by necessary implication, made provision for sufficient notice of its purpose to have benefits assessed against the land of the appellees.

It is Not Necessary that the Act of Congress Itself should Provide for Notice.

It was argued below, and will undoubtedly be argued here, that the act of Congress under consideration is void because in itself it failed to make provision for notice to the persons whose lands were to be assessed. We respectfully submit that this is not so.

At the outset it is important to bear in mind the distinction between the taking of land, which is the exercise of the right of eminent domain, and the assessment of benefits, which is the exercise of the right of taxation. The provisions of the act now assailed are those which relate to the exercise of the right of taxation. The difference is clearly recognized and pointed out in the opinion of the Supreme Court in the highway extension case, Bauman *vs.* Ross, 167 U. S. 558, where, in discussing the matter of benefits, the court said:

> "The provisions of this section are to be referred not to the right of eminent domain, but to the right of taxation, and the general principles applicable to this branch of the case have been affirmed by a series of decisions of this court."

The requirements of law with respect to notice are essentially different in the two classes of cases. The argument of the appellees is that the act of Congress itself should have made provisions for notice to the owners of land proposed to be assessed. A contrary view has been taken by this court and by the Court of Appeals of the District of Columbia.

In Paulsen *vs.* Portland, 149 U. S. 30, the city of Portland passed an ordinance providing for the construction of a sewer and the assessment of the cost thereof upon lots and blocks within a prescribed district. The validity of this assessment was challenged because of its alleged unconstitutionality, on the grounds that it determined arbitrarily and absolutely, that the property therein described was bene-

fited without giving the owners of property any notice or opportunity to be heard upon that question, and also on the ground that the ordinance itself provided for the construction of the sewer without providing for any notice to the owners of property to be assessed. It was contended that the act of the legislature providing for an assessment must also, to be valid, provide for some kind of notice to the property holder. Justice Brewer, delivering the opinion of the court said:

> "But were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus in the case of Gilmore *vs.* Hentig, 33 Kan. 156, it was held that: 'Where a statute authorizes a city to provide for the construction of sewer and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same." See, also, Cleveland *vs.* Tripp, 13 R. I. 50; Davis *vs.* Lynchburg, 84 Va. 861; Williams *vs.* Detroit, 2 Mich. 560; Gatch *vs.* DesMoines, 63 Iowa, 718; Balt. & Ohio RR. Co. *vs.* Pittsburg W. & K. RR. Co., 17 W. Va. 812, 835."

The Court of Appeals of the District of Columbia, 3 App. D. C. 24, where the same argument was made, said:

> "Many well-argued cases hold that this notice must be provided for in the act which confers the power, and that its omission, therefore, can not be compensated by the fact that the council, board or committee charged with the execution of the law may, of their own motion, provide for notice in the regulations or proceedings, which they may prescribe. Stuart *vs.* Palmer, 74 N. Y. 188; Kurtz *vs.* Sumption, 117 Ind. 1; Ullman *vs.* Mayor of Baltimore, 73 Md. 587."

The court then quotes the decision of the Supreme Court in Paulsen *vs.* Portland, *supra*, and adds:

> "In accordance with the doctrine of the foregoing case [Paulsen *vs.* Portland], it seems that when Congress shall confer the power upon the Commissioners of the District of Columbia to make improvements without the request or consent of the owners of abutting property, and assess a part of the cost against them, *the act itself need not expressly require notice*, provided full discretion is left to the Commissioners in the premises, and in accordance therewith they make public and permanent regulations which shall prescribe a fair, reasonable and uniform mode of giving notice to all parties whose property may be affected."

In Lyman *vs.* Plumer, 75 Iowa, 353, the court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires *any* notice to be given.
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> . . . . . .
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> "When the power was conferred on the city to prescribe by an ordinance, the mode, or manner in which the charge for the improvement should be made, it embraced the right on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. *By necessary implication, the power was*

conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power by necessary implication was conferred on the city."

It will be noted that this proceeding as a proceeding in court is distinct from a proceeding before a commission; that it is distinctly a proceeding *in rem* in the Supreme Court of the District of Columbia, holding a district court, to charge the land with the assessment, irrespective of its ownership, and not the owners thereof. The matter was committed to the court generally, full discretion being left in the court, to be proceeded with as deemed by the court proper under the circumstances, and after such notice as the court, by its order, might require. There was no limitation upon the court, nor was there any direct requirement as to the manner of proceeding. The power was granted in general terms, to be exercised by the court after such notice as it should prescribe. The act of Congress obviously intended to leave the whole matter to the court. The court, considering this to be the correct view of the law, directed the notices to be given, which are contained in the Record. It would seem that such notices, supplemented by the implied notice afforded by the act of Congress itself, were ample; they were very obviously effective in this particular proceeding.

Notice by Publication Was Sufficient.

It will be observed that the act committed, generally, the procedure for the taking of this land and the assessment of benefits resulting therefrom to the court, and the court itself prescribed the form of notice actually given. The provisions of chapter 11 relating to the taking of land required personal service of notice upon the owners of the land to be taken if found within the District of Columbia,

but there was no provision for service as to persons whose lands were to be assessed. Obviously there could not have been, even had Congress been disposed to provide for such notice, or the court to require it to be given. The act of Congress under consideration did not definitely fix the assessment area. The only limitations were the boundary lines of the District of Columbia. Such a provision is valid (Bauman *vs.* Ross, p. 591).

But it was impossible to know in advance of the finding of the jury whose lands would be benefited and assessed for benefits. For that reason personal service of notice could not have been made. The plan suggested by the Court of Appeals in its opinion was wholly impracticable.

The Court of Appeals suggested that after the jury had determined what lands should be benefited, it might be regarded as due process of law if a man received notice and was afforded an opportunity to be heard as to the extent of the benefit. According to the same reasoning, assuming both matters are committed to the jury as in this case, a man would seem to have as great a right to be heard upon the question whether his land is benefited at all, as to be heard upon the extent of such benefits. The Court of Appeals said that our Federal Constitution guarantees *personal service* of notice, and effort to make such personal service and failure therein can only afford the foundation for process by publication. We think that in so deciding, the Court of Appeals of the District of Columbia overlooked the distinction between the levying of a tax and the exercise of the power of eminent domain.

In this case, upon the filing of the petition, the Supreme Court of the District of Columbia ordered notice by publication for the appearance of "*all persons interested*," the order reciting that a petition had been filed, as required by the act of Congress, for the condemnation of the land necessary *and the assessment of benefits* "against the pieces or parcels of ground situate and lying on each side for the extension of

the street," which included the land of the appellees. This order was regularly published (Rec., pp. 2, 3). This notice, we submit, was sufficient.

In Lent *vs.* Tillsen, 140 U. S. 316, an act authorizing the widening of a street in San Francisco was assailed. The second section provided that the value of the land taken for the widening of the street, and the damages to improvements thereon and all expenses incident to such widening should be deemed to be the cost of widening the street and should be assesssed upon the district prescribed as benefited in a manner therein stated. The act provided for a notice by publication of not less than ten days in two daily papers printed in the city of San Francisco, notifying all persons interested to appear. Justice Harlan, delivering the opinion of the court, said:

> "Were not these provisions in substantial conformity with the requirements of 'due process of law' as recognized in the decisions of this court? In Davidson *vs.* New Orleans, 96 U. S. 97, 104, it was said that 'whenever by the laws of a State or by State authority, a tax assessment, servitude or other burden is imposed upon property for the public use, whether it be of a whole State or of some more limited portion of the communtity, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' So in Hagar *vs.* Reclamation District, 111 U. S. 701, 708, 'undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in

the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable. . . . As stated by Mr. Justice Bradley in his concurring opinion in Davidson *vs.* New Orleans, 'in judging what is due process of law, respect must be had to the cause and object of the taking, whether the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive and unjust, it may be declared to be not due process of law.' Of the different kinds of taxes which a State may impose, and of which from their nature no notice can be given, the court, in that case, enumerates poll taxes, licenses (not dependent upon the extent of business) and specific taxes on things, persons or occupations (Rec., p. 709, (572).

"These principles were reaffirmed in Kentucky Railroad Tax Cases, 115 U. S. 321, 331, and in Spencer *vs.* Merchant, 125 U. S. 345, 355, in the latter of which cases it was said that 'the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading or repairing (and, equally, the widening) of a street, to be assessed upon the owners of lands benefited thereby;' and that 'the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;' also, that 'if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'

"Tested by these principles, the statute providing for the widening of Dupont street can not be held to be repugnant to the constitutional requirement of due process of law. The notice by publication to all who own property liable to be assessed for the cost of that improvement was appropriate to the nature of

> the case, and was reasonable in respect to the length of time prescribed for the publication. And ample opportunity was given to all persons interested to test in a court of competent jurisdiction the fairness and legality of any assessment proposed to be made upon their property for the purposes indicated by the statute. That court had power to require such alterations or modifications of the report of the board of commissioners as justice demanded. It was not bound to approve any report that did not conform to its judgment as to what was right; and without such confirmation the board could not proceed in the execution of the work contemplated by the legislature."

In Hagar *vs.* Reclamation District, 111 U. S. 702, an act of the legislature of California establishing a general system for reclaiming swamp and overflowed lands and the assessment of benefits resulting therefrom, was assailed as unconstitutional. The act required three commissioners to view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense and to the benefits resulting from the work. The court said:

> "It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the State. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. . . .
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> "The appellant contends that this fundamental principle was violated in the assessment of his property, inasmuch as it was made without notice to him or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provisions for such notice or hearing. . . .
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> "In some States, instead of a board of revision or

equalization, the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or the amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law. In Davidson *vs.* New Orleans, this court decided this precise point. In that case, an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted, on the ground that the proceeding deprived the owners of their property without due process of law; but the court refused to interfere for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms 'due process of law,' and that it would be difficult to give a definition that would be at once perspicious and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case: 'That whenever by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'" 96 U. S. 97.

To the same effect are many cases in the States.

In State *vs.* Runyon, 41 N. J. Law, 103, the court said:

"In that case it was contended that the act of 1876 is inoperative and void for the reason that it

> makes no provision for notice to the owner of the mortgage of the assessment against him; affording him no opportunity to be heard upon the legality of the assessment to which he is subjected. . . . By section 10, the collector of the township is required to give notice of the time and place of such meeting by advertisements set up in at least four of the most public places in the township. . . . Until a comparatively recent period, such as is directed by the sections of the general tax law above referred to was the only notice given of the laying of taxes, and was always regarded as sufficient notification of the assessment and as affording adequate opportunity for objections by those on whom the tax was laid to make its imposition lawful."

In State *vs.* Jersey City, 28 N. J. Law, 503, the court held that notice by publication of a proposed assessment for public improvement was valid.

In the matter of the petition of De Peyster, 80 N. Y. 565, an effort was made to quash an assessment upon the premises of the petitioner for the expense of constructing a sewer, on the ground, among others, that no notice was given to the petitioner. It appeared that there was no personal notice of the proposed assessment or any effort to make such notice. The court said:

> "Personal notice is not needed. The legislature may prescribe what the manner of notice may be. Chapter 326 has provided for notice of the completion of the estimate and assessment to be given to owners or occupants of premises affected. This notice is by publication in daily newspapers for objections in writing to be presented within the time named. . . . The opinion in Stuart *vs.* Palmer, 74 N. Y. 183, is not in conflict. That demands merely that some notice be given and opportunity for hearing had before the assessment becomes conclusive. It says, 'the legislature may prescribe the kind of notice and the mode in which it shall be given.' We will not reason to the end that such notice is all that is

> exacted by the law of the land. Such has been the course of procedure in such cases too long to be now disturbed by legislative or judicial decision. The petition in this case does not present the question that such notice was not given. It presents the question of whether it is needful that there should be personal and individual notice as distinguished from the public and general notice given by advertisements in the newspapers. We think that is not needful."

In W. E. Railway Co. *vs.* Commissioners of Drainage, 134 Ill. 398, the court held that notice by publication was sufficient, the notice being addressed "to whom it may concern."

In the matter of the City of Amsterdam, 126 N. Y. 158, an effort was made to vacate an assessment of benefits for the extension of certain streets. It was objected that the charter of the city failed to provide any notice to the parties assessed, etc. A section of the charter required notice to be published of the determination of the city to make the improvement and to take the lands necessary therefor. After the appointment of the Commissioners a second notice was required to be given by publication, "of the time and place, when and where they will meet to make such ascertainment and assessment." The court said:

> "But after the commissioners have acted and have appraised damages upon the one hand and assessed for benefits on the other, they are required to file a report of their work with the city clerk. Then a third notice is to be given that the report of the commissioners has been so filed and that it may be examined by all interested; that it will be presented at a specified time to the Supreme Court for confirmation and that all persons desiring to object may file their objections with the city clerk. . . . This notice is not confined to the owners whose lands have been taken. It runs to all the parties interested and everybody so in fact interested has

been furnished ample opportunity by inspection of the report on file to know whether he is or not interested, and to file objections and assert his rights, if he shall so please. . . . The statute thus gives him his day in court and full opportunity to be heard."

The court here reviews and distinguishes Stuart *vs.* Palmer, 74 N. Y. 184, and then said:

"If such notice is awarded by the statute, it is of no consequence whether there is a hearing before the commission. Remsen v. Wheeler, 105 N. Y. 579, does not decide the contrary as the respondents contend, citing the last half of the sentence that 'unless the law gave them the right of notice and an opportunity to be heard before the board, which was authorized to impose the assessment, the act was invalid.' That was said of a case in which there was no provision for confirmation and the water-board which made the assessment, by its own action, effectually imposed the tax. Of course, there the necessary hearing was before the board, but the corresponding hearing here is before the special term, by whose action laying the tax is effectually imposed. No different doctrine was declared in Spencer *vs.* Merchant, 100 N. Y. 585; 125 U. S. 356, nor in People *vs.* Turner, 117 N. Y. 227. On the contrary, it was especially said in the latter case that 'notice by publication before the final confirmation of the assessment and an opportunity afforded to make objections within the time specified' constitute the constitutional requirement.

"It is objected here that not only is a notice required by the act to be given after the commissioners have made their assessment, but that the outlying owners would have no reason to suspect that their lands would be affected. The last suggestion is fairly answered by the facts in the Stuart Case. . . . In both cases the sufficient answer is that the landowners must be deemed to have known and understood the terms of the statute and, so, the district of assessment, and if their lands were within

> that district, they were bound to assume that they might be assessed. Here, that district was the city boundaries and everybody within it was notified of the assessment which might reach their lands, and their duty was to examine the report on file and see if it did. That the notice followed the action of the commissioners and did not proceed is no valid objection. That is always the case in the ordinary mode of taxation and the validity of a statute depends not on the mode or time of notice directed, but upon the fact that it directed it and furnished an effective opportunity to be heard."

In Meggitt *vs.* City of Eauclaire, 81 Wis. 326, the city authorities were authorized by charter to apportion the entire cost of a sewer and pavement on a street among the several lots fronting thereon, according to frontage, and the court held that in determining what property will be benefited by the improvement and hence should be assessed therefor, the action of the common council is conclusive. The court said:

> "The principal defect in the assessment here relied upon is the alleged want of notice. . . . The contention is that the charter requires no notice to be given to the lot owner, or any opportunity for the plaintiff to be heard as to the proper amounts of such assessments, respectively, with which her lots were charged. In other words, the contention is that by the provisions of the charter the city was authorized to take the plaintiff's property without due process of law, or any process of law, and hence that the same is in conflict with the Constitution, and therefore void."

The court reviewed the various authorities on the subject of notice and held, in effect, that notice by publication of the letting of the contract for the work, the filing of the statements of assessments and the proposed issue of bonds, unless the lot owners should elect to pay, constituted due process of law.

In Lyman *vs.* Plumer, 75 Iowa, 353, a suit was brought to restrain the collection of a special assessment for improving the streets, on the ground that notice by publication was insufficient. The ordinance provided that the city council, after the work was done and the assessment made to pay for the same, should pass a resolution containing a description of the property, etc., to be published in some daily newspaper, warning persons interested to show cause why the assessment should not be approved. No notice other than the publication of the resolution was given to or served upon the plaintiff. The question certified to the Supreme Court of Iowa was:

> "Is a notice published by resolution as provided by the ordinance sufficient notice to the *resident property owners*, and is it sufficient notice to give resident property owners an opportunity to be heard before the special assessment has been or was made, taking into consideration the fact that the city of Council Bluffs is organized under the general incorporation laws?"

The court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires any notice to be given. That it is competent for the general assembly to prescribe the kind of notice, whether personal or by publication in a newspaper, can not we think, be doubted. . . . No case has been cited which holds that personal notice is required and we do not think that any well considered case so holds. . . . When the power was conferred on the city to prescribe by an ordinance, the mode or manner in which the charge for the improvement should be made, it embraced the right on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. By necessary implication, the power was conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested

> in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power, by necessary implication, was conferred on the city."

In Stewart *vs.* Board of Supervisors, 30 Iowa, 28, the court said:

> "Due process of law means ordinary judicial proceedings in court. . . . So that if this clause of the Constitution is held to apply to the taxing power, then no tax whatever for the support of the government can likely be levied and collected, except through the means of judicial proceedings in the courts; whereas it is well known that the sovereign power of taxation belongs exclusively to the legislative department of the government, and that all taxes are levied and collected in pursuance of legislative enactments, without the aid of the courts. This clause has no reference whatever to the taxing power, and where property is taken in the lawful exercise of the taxing power, it is not taken without due process of law."

In Ricketts *vs.* Village of Hyde Park, 85 Ill. 110, it was held that notice by publication of a special assessment for a public improvement, was sufficient.

In view of the foregoing authorities we submit the court below erred in holding that personal notice was essential to the validity of the assessment against the land of the appellees.

There was Due Process of Law in this Case.

It will be noted that in addition to the notice by publication, given at the institution of the proceedings, after the jury had made its award and had determined the amount of the assessment against the land of appellees, the appellees were served with personal notice to show cause, if any, why the assessment should not be confirmed. The Court of Appeals held that this notice was too late to be

effective, and did not constitute "due process of law" within the meaning of the Fifth Amendment to the Constitution. In this we submit the court erred. We submit that notice given before the assessment became a charge or lien against the appellees' property, with opportunity to contest its validity, was all that "due process of law" requires.

In considering this feature of the case, it will be noticed that the amount of proposed assessment, as ascertained by the jury, did not become a charge or lien upon the property of the appellants until confirmed by the court. It was the act of the court confirming the assessment which made it a tax and a charge upon property; and before that was done in this case full opportunity was afforded the appellees, *after personal service of notice upon them*, to appear before the court and question the assessment, with a full right of appeal. This constituted "due process of law" within the meaning of the Fifth Amendment, as respects the exercise of the power of taxation.

In Cooley on Taxation, page 266, the author says:

> "It is not customary to provide that a taxpayer shall be heard before the assessment is made, but a hearing is given afterwards either before the assessors themselves or before some court or board of review. And of the meeting of that court or board the taxpayer must in some manner be informed; either by personal notice or by some general notice which is reasonably certain to reach him, or, which is equivalent, by some general law which fixes the time and place and of which he must take notice. The last is a common method of enabling him to be heard."

In Hagar *vs.* Reclamation District, 111 U. S. 701, this court says it is—

> "due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its conclusion."

In Yoeman *vs.* Riddle, 84 Iowa, 161, which was a proceeding to vacate a special assessment for repairing a county ditch, it was contended that the assessment was void for want of notice. There was no notice given of the making of the assessment but the laws made provisions for an appeal. The court said:

> "The assessment and levy of taxes in accord with law by proceedings wherein are provisions for an appeal or other means of correcting any error, illegality or want of authority, is not in conflict with the provision of the Constitution against the deprivation of property without due process of law."

In Cleveland *vs.* Tripp, 13 R. I. 51, an effort was made to vacate an assessment for the construction of a sewer on the ground, among others, that the statute did not direct any notice to be given of the assessment, and afforded no right of appeal. The court said:

> "Is is enough, the courts hold, that the person assessed has an opportunity to contest the validity of the assessment in some judicial proceeding after it has been made."

In Gilmore *vs.* Hentig, 33 Kan. 156, a suit was brought to enjoin the collection of a tax levied by the city of Topeka for certain public improvements, on the ground, among others, that there was no notice. The court said:

> "But the statutes alone can not usually furnish a sufficient notice to property owners with regard to special taxes levied upon their property; for special taxes are levied at very irregular periods for various purposes and in various modes. Hence it is generally necessary to give property owners some specific notice with regard to special taxes. It is not necessary, however, in any case, that the notice should be personally served upon the property owner, or that the proceeding should be a judicial proceeding, but any notice that will enable the property owner to procure a hearing before some officer, board or

> tribunal, and to contest the validity and fairness of the tax assessed against him before the same shall become a fixed and established charge upon his property, will be sufficient. Nor is it necessary, in any case, that a notice should be given before the taxes are levied. All that is necessary is, that the notice shall be given before the taxes shall have become such a fixed and permanent charge that the property owner can have no adequate remedy to contest their validity or fairness. . . . In the present case, the statutes did not require that any notice shall be given. . . . We think that the statute is valid, and still that a notice is required. . . . As before stated, we think that the statute is valid, but nevertheless that notice of some kind must be given, but as the statute says nothing about a notice, the city evidently has a broad and almost unlimited discretion with reference to the kind of notice that may be given, and the manner in which it may be given."

In the matter of Amsterdam, 126 N. Y. 158, it appeared that the commissioners of assessment were required by the charter to file a report of their work with the city clerk, and then a notice was to be published that such report was on file for the inspection of all persons interested, and that it would be presented in a specified time to the Supreme Court for confirmation, and that all persons desiring to object might file their objections with the city clerk. On the day appointed, the court was to hear the parties on the report and might confirm or annul it. It was held that these proceedings constituted due process of law, and afforded sufficient notice to those whose property did not abut on the street as well as to the owners of abutting property.

The foregoing well considered case is very similar to the case at bar.

In Davidson *vs.* New Orleans, 96 U. S. 97, this court said:

> "Whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden

> is imposed upon property for the public use . . . and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.'

In concluding this branch of the case we submit, in view of the foregoing authorities, that the law itself provided, and the appellees in fact were accorded, "due process of law."

The Act is Not Unreasonable.

There were several other arguments in opposition to the assessment against the land of the appellees, advanced at the argument below, but not mentioned in the opinion of the court, which may be renewed here. One was that the act is void because it is unreasonable, and its unreasonableness seems to consist in requiring an assessment against the land of the appellees after they had dedicated portions of the land for the extension of the street. But that is an argument which should have been addressed to Congress or considered by the appellees before they voluntarily put the act in operation by making the dedication imposed as a condition precedent to the opening of the street, when they were apprised by the act itself that the assessment was to be made against land "situate and lying on each side of the extension of said streets," in which category came the land of the appellees.

The appellees gave certain land in order to force a street through the adjacent land of another. They were not required to give it; but they did, and now the law is characterized as unreasonable because they are not given in return a benefit to the residue of their holding without an assessment. It was not an exchange at the outset, but complaint

is now made because it is not so treated. It must be conceded that the residue of the holding of appellees is benefited. The argument is one that should have been addressed to Congress.

The Assessment Complained of Clearly Identifies and Describes the Land of the Appellees.

The objection of the appellees made below that the assessment is defective is untenable. The verdict of the jury does not, as claimed by them, omit in the description of the property assessed the proper designation of the courses. An inspection of the original verdict, the order *nisi*, and the publication of the latter in the papers designated by the court, shows that the courses in each case are properly indicated in degrees and minutes. Nor is there any defect in the description of the first piece assessed, as claimed. That description is altogether complete and sufficient.

But it is respectfully submitted that appellees are not at liberty to make such objections on this appeal. They filed no sufficient exception upon the subject. An exception, as in this case, that the description of the property "is inaccurate, insufficient and defective," is entirely too general in its terms and points to no particulars; it is the equivalent of a general assignment of errors and nothing more. No such question as that presented in appellees' brief below on the insufficiency of description was mentioned or argued by counsel at the hearing before the Supreme Court of the District of Columbia, and it can not be entertained on appeal for the first time.

Appellees were not Entitled as a Matter of Right to a Second Jury.

It was argued below that the appellees were entitled as a matter of right to a second jury.

The only provision of law for a second jury as a matter of right is contained in chapter XI, Revised Statutes of the

District of Columbia. This chapter, however, relates exclusively to the *condemnation* of land for a road or highway. Section 263 of the chapter provides for a second jury "if the proper authorities or any owners of the land are dissatisfied with the verdict." It is manifest that the "owners of the land" refers to owners of the land condemned for the highway. The only verdict with which that section deals is a verdict of condemnation and not a verdict of apportionment of benefits.

The exceptional right to demand a second jury must be plainly conferred by express provision of law. The act of Congress approved March 3, 1899, directing the present proceeding, made no such provision. In the nature of the case, such a provision would practically prevent the extension of highways under the scheme of the present law; it would be impossible to reach a final verdict if there was such a provision. Each succeeding verdict might assess property not included in the preceding verdict, and each such assessee *toties quoties* could, upon mere demand, have the verdict set aside. No such absurd result can be imputed to Congress in dealing with this important subject matter.

We respectfully submit that the exceptions to the verdict, award, and assessment of the jury are not well taken, and that the judgment of the court below should be reversed and the judgment of the Supreme Court of the District of Columbia affirmed.

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